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IN THE

Supreme Court of the United States,

FEBRUARY TERM, 1953.

No. 387 Misc.

CORINNE C. WATERMAN,

Petitioner,

—against—

SAUL SCHATTEN, ESTATE OF LOUIS SCHATTEN, his Executors, Administrators and Assigns, and SCHATTEN EQUITIES, INC.,

Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LEO E. BERSON,
Attorney for Respondents,
329 East 149th Street,
New York 51, N. Y.

THE COURT PRESS, N. Y. C.

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SAUL SCHATTEN, ESTATE OF LOUIS SCHATTEN, his Executors, Administrators and Assigns, and SCHATTEN EQUITIES, INC.,

Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is an application by the petitioner, Corinne C. Waterman, for a writ of certiorari to review the decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, dated May 22nd, 1951 unanimously affirming the judgment of the Supreme Court, Bronx County, entered on November 28th, 1949, after trial without a jury, dismissing the complaint, and from the decisions of said Appellate Division, dated May 22nd,

1951, affirming certain intermediate orders entered by the Supreme Court, Bronx County prior to the trial.

The attention of this Honorable Court is respectfully called to the fact that petitioner applied to the Court of Appeals of the State of New York for leave to appeal from said orders of affirmance of the Appellate Division but her motion for leave to appeal was denied by the Court of Appeals on October 18th, 1951.

Preliminary Statement.

An action was brought by petitioner to recover damages for personal injuries allegedly sustained by reason of an allegedly defective refrigerator in the apartment occupied by petitioner in respondents' building, although prior to the commencement of this action petitioner recovered against respondents, and was paid, a judgment for $105 on the identical cause of action on a counterclaim interposed by her in a summary proceeding in the Municipal Court, Borough of Bronx, Second District. The amended complaint contains further purported causes of action for "broadcasting libellous and slanderous communications about her"; property damages; damage for the alleged loss of a typewriter in a burglary in her apartment committed by unknown persons; alleged "malicious" summary proceedings, etc.

Prior to and after the commencement of this action, respondents were compelled to institute various summary proceedings against petitioner for non-payment of rent. In February, 1949 the parties were in the

Municipal Court, Second District, Bronx, on such a proceeding and as a result of petitioner's conduct a summons was obtained in the Magistrate's Court, Bronx County, against her for disorderly conduct. At a hearing thereon before Magistrate Markewich on February 25th, 1949, the petitioner was found guilty, and was committed to Bellevue Hospital Psychiatric Division for observation.

On March 11th, 1949, a hearing was held at Bellevue Hospital before Mr. Justice Aaron J. Levy at which hearing the petitioner was represented by counsel, Irwin M. Levy, Esq., of 51 Chambers Street, New York City, whom she admits was retained by her or in her behalf.

At said hearing petitioner's counsel informed Mr. Justice Levy that several conferences were had with respondents' attorney in the matter and that the parties had agreed that petitioner would vacate the apartment and that the parties would settle all their differences by the mutual exchange of general releases and stipulations discontinuing all actions, proceedings and appeals between them, and the petitioner was discharged.

In the presence of her said attorney, Mr. Levy, petitioner executed and delivered her general releases and stipulations discontinuing this action and certain appeals pending in the Appellate Term, First Department, and the respondents executed and delivered their general release in her favor. The releases signed by petitioner bear the signature of her attorney, Irwin M. Levy, as a witness thereof. The petitioner, in furtherance of said settlement, vacated the apartment.

The Evidence on Behalf of Respondents.

In October, 1949, the action appeared on the day calendar of the Supreme Court, Bronx County, for trial. Upon respondents' advising the Justice then presiding that the action was settled and discontinued, petitioner asserted that the releases and stipulations of discontinuance executed and delivered by her were forgeries and were obtained by duress. The case was thereupon marked ready and thereafter came on for trial before Mr. Justice Henry Clay Greenberg, in Part II of said Court, without a jury, on October 17th, 1950.

Although petitioner appears in person herein, she was represented at the trial by an attorney, Hallam M. Richardson, Esq., who conducted the trial in her behalf.

The general releases and stipulations of discontinuance were introduced into evidence, along with testimony and evidence concerning the facts and circumstances surrounding the execution and delivery thereof. The Trial Court found that the releases and stipulations were not forged, and that there was no evidence of duress, fraud or intimidation. The opinion of the Trial Court is included herein in Appendix A.

Subsequent Proceedings.

The petitioner appealed to the Appellate Division of the Supreme Court of the State of New York, First Department, from the judgment entered in the Supreme Court, Bronx County, on November 28th, 1949, dismissing the complaint, after trial and on the

merits, and also appealed from several intermediate orders, including an order of the Trial Court, which sat without a jury, denying her motion for an order vacating said judgment.

On May 22nd, 1951, the Appellate Division of the Supreme Court of the State of New York, First Department, entered orders unanimously affirming the judgment appealed from and unanimously affirming all the intermediate orders appealed from, including the order to vacate the judgment, all without opinion.

Subsequently petitioner moved in the Appellate Division, First Department, for a reargument of the appeals or for leave to appeal to the Court of Appeals and said motion was denied on June 26th, 1951.

Thereafter petitioner moved in the Court of Appeals of the State of New York for leave to appeal from said orders of the Appellate Division and said motion was denied on October 18th, 1951.

POINT I.

The issues herein involve questions of fact.

The entire question surrounding the circumstances of the execution and delivery of the general releases and stipulations of discontinuance was before the Trial Court, which sat without a jury, at which trial the petitioner was fully represented by counsel. The general releases and stipulations of discontinuance were executed by petitioner in the presence of her attorney, whose signature appears on the releases as a witness thereto.

The testimony and evidence adduced at the trial fully substantiate and support the Trial Court's findings that there was no forgery or duress with respect to the releases or discontinuances executed by petitioner. It is clear from the decision of the Court that it took full cognizance of all the facts in deciding these issues, and that the dismissal of the complaint was fully justified by the evidence before the Trial Court.

It is respectfully submitted that since the trial involved pure questions of fact and the findings of the Court were fully supported by the evidence, there are no issues which should be reviewed by this Court.

POINT II.

No constitutional question is involved.

Petitioner was represented by counsel, Hallam Richardson, Esq., of the New York bar, during the trial of the action at the Supreme Court, Bronx County. She was also represented by counsel, Irving Levy, Esq., of the New York bar, at the time of the execution and delivery of the general releases. Both of these attorneys were either retained by her personally or by members of her family in her behalf, and her rights were fully protected by them. The record does not indicate any invasion, in any respect, of her constitutional rights nor is there any constitutional issue involved in any of the litigation herein which petitioner seeks to have reviewed by this Honorable Court.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari to the Appellate Division of the Supreme Court of the State of New York should be denied.

Dated, New York, March 13, 1953.

Respectfully submitted,

LEO E. BERSON,
Attorney for Respondents,
329 East 149th Street,
New York 51, N. Y.

Appendix A.

Opinion of Trial Court.

At the suggestion of the Court, when the case appeared on the calendar on Friday last the parties agreed that the issue with respect to a claimed forgery of certain documents which constitute defense by the defendants to this action, be tried first. Upon the taking of testimony this morning the attorney for the plaintiff urged also that the Court consider the question with respect to whether or not duress or intimidation had been practiced. The Court permitted testimony offered by the plaintiff in that connection.

The careful consideration of all of the evidence in the case, oral as well as documentary, leads to the unescapable conclusion that none of these documents were forged and each and every one of them bears the genuine signature of the plaintiff in this case, compares with the conceded writings in the handwriting of the plaintiff in this case, with the writings which she made in the presence of the Court, and taking into consideration the testimony of her then attorney, Mr. Levy, that these names were all signed in his presence, the Court is unable to find that any forgery was committed by anyone of the signatures of the plaintiff. On the contrary, the evidence is quite clear that there was no forgery at all, and that this claim has been made out of whole cloth in an attempt to defeat the interest of justice.

Insofar as the claim is made that there was intimidation or duress practiced upon the plaintiff in this

action, there is no evidence which would sustain that claim. On the contrary what took place after the parties left the Court room at Bellevue Hospital was completely in line with what the record before the Court, taken at Bellevue Hospital, before Mr. Justice Levy, demonstrates actually transpired.

The defenses to this action of a release and a discontinuance of the action are sustained. Accordingly, judgment is directed in favor of the defendant dismissing the complaint on the merits. Exception to the plaintiff.

Appendix B.

ORDER OF COURT OF APPEALS DENYING LEAVE TO APPEAL.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the eighteenth day of October A. D. 1951.

Present—HON. JOHN T. LOUGHRAN,
Chief Judge Presiding.

CORINNE C. WATERMAN,

Appellant,

vs.

SAUL SCHATTEN and others &c.,

Respondents.

A motion for leave to appeal to the Court of Appeals and to prosecute appeal as a poor person in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEARON KIMBALL
Deputy Clerk.

Appendix C.

APPELLATE DIVISION ORDER DENYING REARGUMENT AND LEAVE TO APPEAL TO COURT OF APPEALS.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 26th day of June, 1951.

Present—HON. DAVID W. PECK, *Presiding Justice*,
" EDWARD S. DORE,
" ALBERT COHN,
" JOHN VAN VOORHIS,
" FRANCIS D. MCCURN,
Justices.

6A

CORINNE C. WATERMAN,

Pltf.-Applt.,

vs.

SAUL SCHATTEN, ESTATE OF LOUIS SCHATTEN, his Executors, Administrators and assigns, and SCHATTEN EQUITIES, INC.,

Defts.-Respts.

The above-named plaintiff-appellant having moved for leave to reargue, and to do so orally, the appeals taken by her from a judgment of the Supreme Court, Bronx County, entered on the 28th day of November, 1949; from an order made by said court and entered

on the 16th day of June, 1949, denying her motion for an order adjudging Saul Schatten, Henry Kaufman, the attorney for the defendants, and Leo P. Marx, a City Marshal, in contempt of court and from the order made by said court and entered on the 28th day of September, 1949, granting reargument of the motion decided by the order entered June 16, 1949 and, on reargument, adhering to the original determination; from an order made by said court and entered on the 3rd day of June, 1949, denying her notice for "a Mandamus Order" directing defendants and their attorneys to surrender certain releases, agreements and stipulations signed by her on March 11, 1949, and directing the Superintendent of and a doctor of Bellevue Hospital, New York City, forthwith to correct the record and minutes of proceedings herein at such hospital on March 11, 1949, and for other relief, and from the order made by said court and entered on the 15th day of September, 1949, granting reargument of the motion decided by the order entered June 3, 1949 and, on reargument, adhering to the original determination; and from an order made by said court and entered on the 7th day of February, 1950, denying plaintiff's motion for an order "nullifying and voiding" the judgment of said court entered on the 28th day of November, 1949; and from an order made by said court and entered on the 7th day of March, 1950, granting reargument of the motion theretofore made by plaintiff for relief by mandamus and injunction, and for an order permitting plaintiff to have a photostatic copy made of the minutes of proceedings herein, held at Bellevue Hospital, New York City, on March 11, 1949 and, upon reargument, ad-

hering to the original determination denying the relief sought by plaintiff, or, in the alternative, for leave to appeal to the Court of Appeals,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Corinne C. Waterman in support of said motion, and after hearing Miss Corinne C. Waterman, appellant in person, for the motion, and Mr. Leo E. Berson opposed,

It is ordered that the said motion be and the same hereby is, in all respects, denied.

Enter:

GEORGE T. CAMPBELL
Clerk.

Appendix D.

ORDER OF AFFIRMANCE OF APPELLATE DIVISION.

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 22 day of May, 1951.

Present—HON. DAVID W. PECK, *Presiding Justice,*
" EDWARD S. DORE,
" ALBERT COHN,
" BERNARD L. SHIENTAG,
" FRANCIS D. MCCURN,
Justices.

4455

CORINNE C. WATERMAN,

Plaintiff-Appellant,

—against—

SAUL SCHATTEN, ESTATE OF LOUIS SCHATTEN, his Executors, Administrators and assigns, and SCHATTEN EQUITIES, INC.,

Defendants-Respondents.

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

An appeal having been taken to this Court by the plaintiff-Appellant from a judgment of the Supreme Court, Bronx County entered on the 28 day of No-

vember 1949 and said appeal having been argued by Miss Corinne C. Waterman, Appellant in person and by Mr. William J. Tropp of Counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter:

GEORGE T. CAMPBELL
Clerk

Appendix E.

APPELLATE DIVISION ORDER DENYING MOTION TO VACATE JUDGMENT OF TRIAL COURT.

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 22nd day of March 1951.

Present—HON. DAVID W. PECK, *Presiding Justice,*
" EDWARD S. DORE,
" ALBERT COHN,
" JOHN VAN VOORHIS,
" FRANCIS D. MCCURN,
Justices.

4458

CORINNE C. WATERMAN,
Appellant,
—against—
SAUL SCHATTEN, *et al.,*
Respondents.

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

An appeal having been taken to this Court by the Plaintiff-Appellant from an order of the Supreme Court, Bronx County entered on or about the 7 day of Feb., 1950, denying plaintiff's motion for an order

nullifying and voiding the judgment of said court entered on the 28 day of Nov. 1949 in favor of the defendant dismissing the complaint herein, and said appeal having been argued by Miss Corrinne C. Waterman, appellant in person, and by Mr. William J. Tropp, of counsel for the respondents and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed.

Enter:

GEORGE T. CAMPBELL

Exd

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HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 398 MISC.

JOHN T. MILLER,
Libelant,

vs.

STANDARD OIL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit, and
BRIEF IN SUPPORT THEREOF.

S. Ellsworth Sampliner and
Victor G. Hanson,
301 Carton Bldg., Cleveland, Ohio,

Robert F. Doyle,
514 West North Avenue,
Chicago 10, Illinois,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-0917

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In the Supreme Court of the United States

No. . . . . .

OCTOBER TERM, 1952.

JOHN T. MILLER,

Libelant,

vs.

STANDARD OIL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Seventh Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, John T. Miller, libelant, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit rendered November 5, 1952 affirming a final decree in admiralty of the District Court for the Northern District of Illinois, Eastern Division filed on May 9, 1952 in favor of respondent. That decree dismissed the libelant's case on its merits with prejudice.

JURISDICTION.

Jurisdiction is based on 28 U. S. Code Sec. 1254 (1).

The judgment below was entered November 5, 1952, and the petition for hearing was denied on November 25, 1952.

The case involves an interpretation of the Great Lakes Statute 28 U. S. C. A. Sec. 770; Sec. 28 U. S. C. 1873, June 25, 1948.

SUMMARY STATEMENT.

The libelant was employed as a seaman by the respondent on the Steamer Robert W. Stewart and while so employed on December 21, 1944 he sustained an injury to his knees and back while in the course of his employment as a seaman and under articles as an ordinary seaman.

Paragraph 3 of the libelant-appellant's suit in admiralty alleged that the respondent did own and operate the Steamer Robert W. Stewart, being a vessel of the United States of more than 20 tons burden, enrolled and licensed for the coasting trade and was employed and engaged in the business of commerce and navigation between places in different states and upon the Great Lakes and their connecting and tributary waters, and this allegation was in substance admitted by the respondent in paragraph 3 of their Answer.

A demand for a jury trial was made by the libelant and the respondent made exception to this demand and on January 22, 1952 the Honorable J. S. Perry entered an order sustaining the respondent's exception, thus denying the libelant-appellant a trial by jury.

The suit was tried without a jury, and testimony of the respondent's witnesses disclosed that the injury occurred as alleged by the libelant.

THE DECISIONS BELOW.

The District Court held that the libelant was not entitled to a trial by jury. The District Court further held that the libelant sustained an injury to his knees as alleged but that said injury was not disabling and therefore he was not entitled to any maintenance and cure. It entered a decree in favor of respondent, dismissing the libel on its merits with prejudice.

The Court of Appeals for the Seventh Circuit ruled that the findings of fact made by the admiralty court were supported by substantial evidence. This Court took cognizance of the Act of June 5, 1948 Section 1873 entitled Judicial Code and Judiciary, which reads as follows:

> "In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it."

Reading from page 4 of the United States Court of Appeals' Opinion the court said:

> "It will be noted that the portion of the act now retained in our Federal Statutes relates (a) to matters of contract and tort; (b) arising upon or concerning a vessel of 20 tons burden or upwards; (c) which vessel is enrolled and licensed for the coasting trade; and (d) employed in commerce and navigation between places in different states and upon the lakes and navigable waters connecting such lakes.
>
> The libel in the proceeding under consideration specifically charged the existence of the elements (b) (c) and (d), that is to say: it charged that the ship

'Robert W. Stewart' was of 20 tons burden or upwards; that it was enrolled and licensed for the coasting trade; that it was engaged in commerce and navigation between places in different states on the lakes and their tributaries. We find these elements are established in the record.

But as to the element we have marked (a) the only allegation in the libel is an allegation that the proceeding is for 'maintenance and cure, a cause of action, civil and maritime.'

"We are therefore confronted with the question: Is a proceeding by a seaman against his shipowner for maintenance and cure, a matter of contract and tort within the meaning of Section 1873 of the Judicial Code of the United States of 1948."

The court held that a suit for maintenance and cure is not a contract action and therefore a seaman is not entitled as a matter of right to demand a jury trial in a case seeking maintenance and cure. Accordingly it affirmed the judgment of the District Court.

STATUTES INVOLVED.

(1) The Act of February 20, 1845, 5 Stat. at L. 726 (1845).

(2) Judiciary Act of 1789, 28 U. S. Code 41 (3).

(3) Great Lakes Statute, 28 U. S. C. A. Sec. 770; Sec. 28 U. S. C. 1873, June 25, 1948, C. 646, 62 Stat. 953.

QUESTION PRESENTED.

Whether or not a suit in admiralty for maintenance and cure is a matter of contract or tort to be tried by jury when either party requires it as provided by the Great Lakes Statute, 28 U. S. C. A. Sec. 770; Sec. 28 U. S. C. 1873, June 25, 1948.

ASSIGNMENT OF ERRORS.

The libelant, John T. Miller, hereby assigns error in the proceedings, decrees, orders and decisions of the District Court and the Court of Appeals in the above-entitled action as follows:

First: The District Court and the Court of Appeals erred in failing to grant libelant a trial by jury.

Second: The District Court and the Court of Appeals erred in holding that the libelant was not even entitled to a dav's maintenance and cure after they had found that the libelant had sustained an injury, although he must be afforded some maintenance and cure if injured in the service of the ship.

Third: The Court of Appeals erred in holding that maintenance and cure is not a matter of contract or tort.

Fourth: The Court of Appeals erred in holding that the Great Lakes Statute, 28 U. S. C. A. Sec. 770; Sec. 28 U. S. C. 1873, June 25, 1948, C. 646, 62 Stat. 953 was not applicable to the present case after the Court of Appeals had expressly found that all elements necessary to bring the case under the statute were present except they went on to hold that this maintenance and cure action was not one of contract or tort.

Fifth: The Court of Appeals erred in affirming the District Court's finding that the allegations of the libelant had not been proved.

Sixth: The Court of Appeals erred in affirming the decree of the District Court dismissing the libel and entering a judgment in favor of the respondent and taxing the costs against the libelant in favor of the respondent.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision below is in direct conflict with the decisions of this Court as to the meaning and effect of an action for maintenance and cure.

The Iroquois, 194 U. S. 240;

Pacific Steamship Company v. Peterson, 278 U. S. 130;

Cortes, Administrator v. Baltimore Insular Line, Inc., 287 U. S. 367;

Calmar Steamship Corp. v. Taylor, 303 U. S. 525.

2. That the decision below is in direct conflict with the decision of the Sixth Circuit on the same point.

Runyon v. Great Lakes Dredge & Dock Co., 141 Fed. Reporter 396.

3. The decision below is in direct conflict with the decision of the Ninth Circuit.

The City of Avalon, 156 Fed. 2d 500.

4. The decision below is in direct conflict with decisions on this point in the various District Courts.

Vincent v. Ann Arbor R. Co., District Court, S. D. New York, 73 Fed. Supp. 729;

Sperbeck v. A. L. Burbank & Co. Inc., U. S. District Court, S. D. New York, 88 Fed. 623;

Burkholder v. U. S., District Court, Pa. 1945, 60 F. Supp. 700, 186 F. 2d 1015;

McDonald v. Cape Cod Traveling Corp. et al., District Court Massachusetts, 71 Fed. Supp. 888.

5. The question presented is one of general public importance and the decision below constitutes a plain misapprehension of the purpose and effect of the Great Lakes Statute.

Wherefore petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Court of Appeals for the Seventh Circuit commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record below and that the decision of said Court of Appeals be reversed and that petitioner have such other and further relief as may be just.

S. ELDRIDGE SAMPLINER,

VICTOR G. HANSON,

301 Caxton Bldg., Cleveland, Ohio,

ROBERT F. DOYLE,

514 West North Avenue,
Chicago 10, Illinois,

Attorneys for Libelant and Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. . . . . .

JOHN T. MILLER,
Libelant,

vs.

STANDARD OIL COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION.

POINT I.

The decision below is in direct conflict with the decisions of this Court as to the meaning and effect of an action for maintenance and cure.

In the case of the *Pacific Steamship Company v. Peterson,* 278 U. S. 130, this Court stated that

> "The right to maintenance, cure and wages under the old admiralty rule is a contractual right, cumulative to and not inconsistent with, or an alternative of, the new right to recover compensatory damages for injuries caused by negligence."

In *Harden v. Gordon,* 2 Mason 541, 11 Fed. Cas. 480, 481—cited with apparent approval in the *Osceola* case, 189 U. S. 158—Mr. Justice Story said that a claim for the expenses of curing a seaman in case of sickness "constitutes, in contemplation of law, a part of the compensation for the labour and services of the seamen."

In *Cortes, Administrator v. Baltimore Insular Line, Inc.,* 287 U. S. 367, Mr. Justice Cardozo said the duty to

provide maintenance and cure is contractual in the sense that it has a source in a relation which is contractual in origin. The court further stated in that case:

> "If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt."
>
> "We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more. The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties. For breach of a duty thus imposed, the remedy upon the contract does not exclude an alternative remedy built upon the tort."
>
> "Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfillment of the duty thus recognized by law."
>
> "The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited. Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection."

In the case of *Calmar Steamship Corp. v. Taylor,* 303 U. S. 525, Justice Stone citing the *Osceola* case and the *Cortes vs. Baltimore Insular Line* case, *supra,* stated the duty to provide maintenance and cure arises from the contract of employment.

Mr. Justice Story in *Harden vs. Gordon, supra* stated:

> "the protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of ill-

ness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service."

Thus a cause of action for maintenance and cure would have to be one based either on contract or tort and if so a seaman is entitled to a trial by jury under the Great Lakes Statute. A right of trial by jury is a right to be protected with jealousy, and in the present case where the Court of Appeals has found that all facts necessary to place this case under the protection of the Great Lakes Statute were shown the libelant should not be denied this right as a result of an erroneous conclusion that maintenance and cure is not a matter of contract or tort.

POINT II.

The decision below is in direct conflict with the decision of the Sixth Circuit on the same point.

"It is settled that the right to maintenance, cure and wages of a seaman is a contractual obligation arising out of the nature of the employment." *Runyon v. Great Lakes Dredge & Dock Co.*, 141 Fed. Reporter 396.

POINT III.

The decision below is in direct conflict with the decision of the Ninth Circuit.

"The purpose of the historic implied contract to maintain an injured seaman arises from his helplessness during his injury, a right every court should watch with jealousy to maintain." *The City of Avalon*, 156 Fed. 2d 500.

POINT IV.

The decision below is in direct conflict with decisions on this point in the various District Courts.

> "Recovery for maintenance and cure by seaman who becomes sick in service of vessel arises out of contract of employment and is not predicated on negligence." *Vincent v. Ann Arbor Co.*, District Court, S. D. New York, 73 Fed. Supp. 729.
>
> "Right of injured seaman was contractual and did not abate upon death of seaman." *Sperbeck v. A. L. Burbank & Co. Inc.*, U. S. District Court, S. D. New York, 88 Fed. 623. In this case the court cited the *Cortes* case 287 U. S. 367 as authority and explained that when Justice Cardozo said that under maritime law the remedy ends with the seaman's death, Justice Cardozo was speaking of the tort of failing to give maintenance and cure which caused or aggravated an illness.
>
> "A seaman's right to maintenance and cure and wages is a contractual right independent of right to recover indefinitely under the general maritime law." *Burkholder v. U. S.*, District Court Pa. 1945, 60 F. Supp. 700, 186 F. 2d 1015.
>
> "The cause of action for maintenance and cure is founded on a maritime quasi contract." *McDonald v. Cape Cod Traveling Corp. et al.*, District Court Massachusetts, 71 Fed. Supp. 888.

POINT V.

The question presented is one of general public importance and the decision below constitutes a plain misapprehension of the purpose and effect of the Great Lakes Statute.

ARGUMENT.

A review of the early law that formed a basis for the Great Lakes Statute will aid one in determining the meaning and effect of said statute.

The Act of February 20, 1845, 5 Stat. at L. 726 (1845), was the result of the development of commerce upon the Great Lakes, especially after the introduction of Steamboats, as it was thought desirable that the same law should be applied there, as had always been applied on the high seas and tidal waters connected therewith. It was an Act extending the jurisdiction of the District Court to certain cases upon the lakes and navigable waters connecting the same. This Act expressly conferred upon the District Courts admiralty jurisdiction on the Great Lakes in matters affecting enrolled or licensed vessels, of at least 20 tons burden, engaged in commerce between different states and territories as upon the high seas or tidal waters.

The Great Lakes, and the navigable waters connecting them, were declared to be within the constitutional scope of admiralty and maritime jurisdiction. *The Genesee Chief* (1851), 53 U. S. (12 How.) 443, 13 L. ed. 1058.

This Act of 1845 as the title implies, was plainly an act professing to extend the jurisdiction and the provisions saving the right of trial by jury of facts put in issue where either party should require it and it was included because of reverence for the jury system.

The practice of injecting jury trials into Admiralty proceedings on the Great Lakes and waters connected therewith, was carried into Section 566 of the revised statutes.

As the Great Lakes are navigable, District Courts also have jurisdiction under the terms of the Judiciary Act of 1789, 28 U. S. Code 41 (3). Therefore, the Act of 1845, which was passed for the purpose of extending the ad-

miralty jurisdiction, was accordingly inoperative as a grant of jurisdiction and also inoperative as a restriction upon it because not so intended.

The leading case on the subject is the *Western States* (1908), 159 F. 354, 357 (C. C. A. 2d). This case discusses all the early statutes and cases, including the Rev. St. 566 (U. S. Comp. St. 1901, p. 4611). This statute provided that in cases of admiralty and maritime jurisdiction relating to any matter of contract or tort arising on or concerning any vessel of 20 tons burden or upward, enrolled and licensed for the coasting trade and at the time employed in the business of commerce and navigation between places in different states and territories upon the Great Lakes and navigable waters connecting the Lakes, the issues of fact shall be tried by jury when either party requires it. The Court further held that the verdicts rendered under Section 566 were not merely advisory.

The case of *Boyd v. Clark*, 13 Fed. 908, often confused as holding that the verdict under Section 566 was advisory only, never really decided this point but only held that the proper practice in such cases was to take on appeal, and not a writ of error, and as to the effect of the verdict, Mr. Justice Matthews declined to express an opinion.

In the *Genesee Chief*, 12 How. 443, 13 L. Ed. 1058, the court treated the provision for a jury trial as a regulation of practice, and it was not necessary to be decided, because the learned judge found the vessel did not fall within the provisions of Section 566.

The Act has been repealed but its provision securing to either party in admiralty cases the right to jury trial if he thinks proper to demand it, has been preserved, 28 U. S. Code 770; *Sellon, Admx. v. Great Lakes Tr. Co. (The H. A. Scandrett)*, 1937 A. M. C. 326, 87 F. (2d) 708 (C. C. A. 2d).

A libelant is entitled to a jury trial under 28 U. S. C. A., Sec. 770, if his pleadings show that the vessel on which it is claimed his injury was sustained, was 20 tons burden or upward, enrolled and licensed for the coasting trade, or that it was at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, *Strusa v. Minnesota Atlantic Transit Co. et al.*, 13 Fed. Supp., page 872.

28 U. S. C. A. 1873 provides:

> "in any case of admiralty or maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel by twenty tons or upward, enrolled and licensed for the coasting trade and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it. June 25, 1948, C. 646, 62 Stat. 953."

Therefore, the law above cited clearly indicates that the libelant was entitled to a trial by jury and therefore the decree, insofar as it was based on a trial without a jury was erroneous.

POINT VI.

The petitioner respectfully submits that maintenance and cure if not a contract must be a tort, it has to be one or the other, and as such is covered by the Great Lakes Statute above mentioned. Assuming for the purposes of this petition that the District Court and the Court of Appeals decision was correct in all respects save this one, the case should be remanded to the District Court for a trial by jury.

LAST POINT.

It is respectfully submitted that a writ of certiorari should be granted, and that the decisions of the District Court and the Court of Appeals should be reversed.

Respectfully submitted,

S. ELDRIDGE SAMPLINER & VICTOR G. HANSON,
301 Caxton Building, 812 Huron Road,
Cleveland 15, Ohio,
and
ROBERT F. DOYLE,
514 West North Avenue,
Chicago 10, Illinois,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 398 MISC.

JOHN T. MILLER,
Libelant, Petitioner,

vs.

STANDARD OIL COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STUART B. BRADLEY,
135 S. LaSalle Street,
Chicago 3, Illinois,
Counsel for Respondent.

SEAGO, PIPIN, BRADLEY & VETTER,
135 S. LaSalle Street,
Chicago 3, Illinois,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 398

JOHN T. MILLER,
Libelant, Petitioner,

vs.

STANDARD OIL COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, Standard Oil Company, requests that the Petition for Certiorari be denied and presents this brief in opposition to said petition.

STATEMENT.

The action in the United States District Court was filed in admiralty asking an award under the doctrine of maintenance and cure, anciently developed by the admiralty courts out of the relationship of the seaman to his ship. No wrongful act was alleged; none is necessary to an award for maintenance and cure as such awards are not based on negligence, and rights of a seaman in any given case exist regardless of any meeting of the minds.

This is the case of a seaman who in 1944 slipped and skinned his shin, which was cured in less than three weeks, who lost no time from work and sustained no medical expense. His libel for alleged maintenance and cure was fully heard in open court on oral testimony and was dismissed as being without merit. The District Court stated at the conclusion of the testimony that it is the kind of a case that "should not be brought." On the appeal the

record was before the Court of Appeals, which hears admiralty cases *de novo* and that court found that the findings of the District Court were supported by substantial evidence.

Petitioner contends in his assignment of errors that the two lower courts erred in failing to grant the petitioner a trial by jury, to which he claims the right under the Act of February 20, 1845, 5 Stat. at L. 726, now codified in 28 U.S.C.A. 1873. He also claims that these courts erred in finding that the allegations of the libel had not been proved. The statute which is involved applies only on the Great Lakes, and then only in certain limited types of cases as specified in the Act itself. We submit that the case at bar does not fall within the statute, that the Court of Appeals correctly interpreted the law and that there is no merit in the Petition for Certiorari.

Reasons Relied on For the Allowance of the Writ are set forth on page 6 of the Petition in five numbered paragraphs. All five of these statements are false as is apparent from even the most casual examination of the authorities cited in support thereof. None of the cases cited therein by Petitioner deal with or even cite the Great Lakes jury trial statute on which the Petitioner relies in the case at bar. Paragraphs 2, 3 and 4 of the Reasons state that the decision below is in direct conflict with decisions of the Sixth and Ninth Circuits and various District Courts. That is manifestly untrue.

As to the Petitioner's assertion in Reason 5 that the question presented is one of general public importance, we restrain ourselves in saying simply that this attempt to take from the admiralty court one of its most ancient and logical prerogatives is of no interest or importance generally but interests only the Petitioner herein and possibly some few proctors whose cases are similarly without merit wherein another "bite" on the shipowner might force a settlement to avoid expense of jury trial.

ARGUMENT.

Reference will here be made to the Brief in Support of Petition, point by point in the order therein used.

Point I.

It is claimed that the decision below is in direct conflict with the decisions of this court as to the meaning and effect of an action for maintenance and cure. Cited to this point is *Pacific S.S. Co.* v. *Peterson,* 278 U.S. 130, which was an action at law in a state court for damages under the Jones Act, the court holding that previous receipt of maintenance and cure did not in law constitute an election which would prevent recovery of damages. This case is entirely consistent with the decision below in the case at bar, this Court pointing out, p. 138, that the right to maintenance and cure is implied in law.

Harden v. *Gordon,* 11 Fed. Cas. 480, No. 6047 referred to the law of maintenance and cure for seamen as "the parental law, which relieves them in sickness by fastening their interests to the ship." (p. 483).

Cortes v. *Baltimore Insular Line,* 287 U.S. 367 was a suit for damages based on failure to provide proper medical care. It was not a suit for maintenance and cure as such but for damages based on a breach of the duty imposed by law, in which Justice Cardozo's opinion clearly stated the nature of maintenance and cure as follows:

> "The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties." (287 U.S. at 372; 53 S. Ct. at 174)

> "Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfillment of the duty thus recognized by law." (287 U.S. at 374; 53 S. Ct. at 175)

Calmar S.S. Corp. v. *Taylor,* 303 U.S. 525, next cited by petitioner likewise demonstrated that the obligation to provide maintenance and cure arises out of public policy (p. 530). That seamen are wards of the admiralty court as to maintenance and cure is conceded by petitioner. In an admiralty case such as this, an award of maintenance and cure rests in the sound discretion of the admiralty court as to the seaman, its ward. To give such determination to a jury would amount to making the seaman the ward of twelve jurors not versed nor skilled in such matters and would breach the relationship between the admiralty court as fiduciary or trustee and the seaman as its ward.

None of the cases cited by petitioner under Point I support the proposition contended for, and although they do not involve the statute now before this Court, the language of the opinions in all of the cited cases is consistent with and in fact supports the decision of the Court of Appeals below.

Point II.

Petitioner cites *Runyan* v. *Great Lakes Dredge & Dock Company,* 141 F. 2d. 396 as being in direct conflict with the decision below. That cited case was in admiralty *without jury trial* and the only question was whether the damages alleged had been included in a prior suit.

Point III.

Conflict with the Ninth Circuit is asserted in the Petition, citing *The City of Avalon,* 156 F. 2d 500. That was

a libel in admiralty (without jury) against a fishing boat and its owner to recover for food (maintenance) after an injury and for a share in the catch. Libelant had recovered damages in a separate suit which did not embrace maintenance and cure. Hence there was no estoppel. The opinion points out that courts should watch with jealousy "the historic implied contract to maintain an injured seaman * * *"

Point IV.

Here the petition asserts that the decision below is in direct conflict with decisions on this point in the various District Courts. That simply is not so. The cases cited do not pertain to the Great Lakes jury trial statute in any respect. They refer to maintenance and cure in general terms as arising out of the contract, or as being quasi contractual or annexed to the employment in distinguishing the right to an award from an action for damages under the Jones Act. This is not even *dicta* in support of Petitioner. What is a "matter of contract" under the statute with which we are concerned is a different question entirely.

Vincent v. *Ann Arbor R. Co.*, 73 F. Supp. 729, cited under Point IV, was a libel in admiralty for maintenance and cure (without jury) brought by a Great Lakes seaman in the Southern District of New York. The question was of venue and the court said the Jones Act venue did not govern.

Sperbeck v. *A. L. Burbank & Co.*, 88 F. Supp. 623, stated with some measure of doubt that a cause of action for maintenance survives the seaman's death. The opinion discusses the nature of maintenance and cure and reaches no conclusion as to whether it is contractual, delictual or "something else." (p. 625-626)

Burkholder v. *United States,* 60 F. Supp. 700 simply states the well known rule that there are alternative remedies under the Jones Act or for unseaworthiness, which the seaman must elect, but that aside from either of these remedies the seaman can sue the United States for maintenance and cure under the Suits in Admiralty Act in admiralty without jury trial.

McDonald v. *Cape Cod Trawling Corp.,* 71 F. Supp. 888 holds that where diversity of citizenship is absent, a Jones Act case and a claim for damages against a shipbuilder for alleged negligent manufacture of a chattel cannot be joined in one suit at law with jury trial. Maintenance and cure was not involved although discussed for purposes of comparison wherein the Court points out that if such suits are filed in admiralty the trial is without jury.

Statutory Provision for a Jury Trial in Admiralty Applicable to Certain Limited Situations on the Great Lakes Does not Apply to the Case at Bar.

It is contended in Petitioner's brief that the Act of February 20, 1845, 5 Stat. at L. 726 (1845), gives libelant the right to a jury trial. This statute was passed during the epoch when it was believed that admiralty jurisdiction was co-extensive with the ebb and flow of the tide and that the constitutional grant of admiralty jurisdiction to the Federal Courts would not extend these benefits to the Great Lakes. It was then deemed advisable to provide for a jury trial in admiralty in the particular instances stated in the Act. The Court later held that the act had no effect as a grant of admiralty jurisdiction, as it was found that such jurisdiction extended beyond tidewater by virtue of the Constitution and the Act of 1789 (1 Stat. 73). *The Genesee Chief,* 12 How. 443 (1851).

However, subsequent codifications have retained that part of the act relating to a jury trial in the limited situations as originally enacted. Except to the extent provided in this statute trials in admiralty are before the court without a jury. Because the statute is a limitation upon the admiralty courts it must be strictly applied. The courts have universally ruled that all of the elements mentioned in the statute must be present in order that a jury trial may be had in an admiralty case if either party objects.

Thus in the case of *The Frank J. Fobert,* 32 F. Supp. 214 (W.D. N.Y. 1940) the jury demand was stricken because at the time of the accident the vessel was not on a voyage "between different states and territories upon the lakes and navigable waters connecting the lakes." It was on a voyage between New Haven, Connecticut via the Hudson River, New York State Barge Canal and through Lakes Ontario and Erie and the Niagara River their connecting link. Because the voyage started at a point outside the lakes and the navigable waters "connecting" the lakes, the statute was inapplicable. In the case at bar the vessel was not on a voyage, it was laid up for the winter. Further it was in the Indiana Harbor Canal which is navigable but is not "a navigable water connecting the lakes."

The limited application of the jury trial statute is further illustrated by the case of *Gillet* v. *Pierce,* 10 Fed. Cas. 388, No. 5437 (E.D. Mich. 1875) where a jury trial was denied because the pleadings did not show that the vessel was enrolled and licensed, although it was on a voyage between Lake Huron and Buffalo on Lake Erie. Referring to this law District Judge Longyear said, p. 389:

> "It is respectfully suggested, however, that, without further legislation, it is a mere excrescence upon the jurisdiction of the admiralty courts, partial in

> its provisions, impracticable of application in many of the cases sought to be provided for by it, and in some respects impossible of execution so as to do complete justice, for want of the necessary machinery to carry it out to its proper and legitimate results. It is partial, because it includes only a portion of the causes cognizable in the admiralty, and as to those it is limited to such only as arise in a restricted locality."

Petitioner's brief, page 15, cites *Strusa* v. *Minnesota Atlantic Transit Co.*, 13 Fed. Supp. 872 (W.D. N.Y. 1936). That was a Jones Act case filed in admiralty. The court denied a jury trial because it was not shown that at the time of the accident the vessel was employed in the business of commerce between different states. The court said, page 873, "On proof of such facts only would the defendant be entitled to a jury trial." Further, that was not a case of maintenance and cure.

In *The Erie Belle*, 20 F. 63 (E.D. Mich. 1883), a case of damage to a vessel arising out of towing, a jury trial was granted as the statutory specifications were met, but the court said, p. 64:

> "I doubt, however, whether the statute would apply at all to cases of pure salvage, as they are neither matters of contract nor tort, or to cases wherein both vessels are foreign, or engaged in foreign trade, or in trade between ports in the same state."

Petitioner's brief, page 14, refers to *The Western States*, 159 F. 354 (2 Cir. 1908) as the leading case on the subject. That was a libel filed by a passenger who had been robbed and beaten by a member of the crew while the vessel was on an interstate voyage. A jury trial was had but a verdict for $15,000 was reduced by the trial judge to $5,000 because he thought the verdict was the result of passion and prejudice, and decree was entered for the

latter sum. The decree was affirmed with the comment that the proceeding on appeal is in the nature of a new trial (p. 360).

None of the cases cited in Petitioner's brief hold that a seaman is entitled to a jury trial for maintenance and cure in the admiralty court over objection of a respondent. Maintenance and cure is neither a matter of contract or of tort but is a matter of status, a right unknown to the common law but provided to seamen as wards of the admiralty court under the general maritime law. Accordingly, for this further reason, the jury trial statute is inapplicable to libels for maintenance and cure.

The only case cited by Petitioner on the jury question which pertained to the injury of a seaman is *Sellon* v. *Great Lakes Transit Corporation,* 87 F. 2d 708 (2 Cir. 1937). That was a suit for injuries resulting from unseaworthiness combined with a count for maintenance and cure. There was a verdict on both counts for the libelant. Only the verdict for damages was appealed and the opinion does not touch in any way upon whether there had been any objection to a jury trial by respondent nor as to the applicability of the jury trial statute to a libel for maintenance and cure.

The Petitioner argues that maintenance and cure if not a contract must be a tort, that it has to be one or the other. If Congress had intended to grant a jury trial in admiralty as to all causes of every nature it would not have limited the statute to "any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward * * *." Although the courts have referred to maintenance and cure as a right annexed by law to the employment, the true nature of the right is indicated in *Dryden* v. *Ocean Accident & Guarantee Corp.,* 138 F. 2d 291, 293:

> "Concededly an employee-employer relationship is a contractual one. Probably many of the details of that relationship—wages, hours, etc., are fixed by specific contract provisions and are express contractual rights. But the right here sought to be enforced by the seaman was not founded on a "meeting of the minds"—it was inexorably attached by ancient and established maritime *law* to every seaman's contract of employment. The parties had no choice in the matter. It was a duty superimposed by *law* coincidental with the formation of the contractual relation. The seaman could not contract against it—his or his employer's will is powerless to destroy it. This aspect alone reflects the true nature of the right here sought to be enforced. It is a right which the maritime law, in the wisdom of experience, found necessary and just, for the complete protection of seamen, whom maritime law has treated as "wards of admiralty."

As Justice Cardozo said in *Cortes* v. *Baltimore Insular Line,* 287 U.S. 367, it is a duty annexed by law to the relationship "and annexed as an inseparable incident without heed to any expression of the will of the contracting parties." (p. 372)

The statute in the case at bar is in derogation of the admiralty law and must be strictly construed. The decisions which have interpreted the statute such as *Gillet* v. *Pierce,* 10 Fed. Cas. 388, No. 5437 (E.D. Mich. 1875) were briefed and argued before the Court of Appeals. This Great Lakes jury trial statute has been on the books more than a century. Evidently during that time litigants have well understood that causes of maintenance and cure in admiralty are to be decided by the admiralty court without a jury, otherwise there would have been decisions on the point. There are hundreds of cases in which the admiralty courts have heard and decided matters of maintenance and cure arising on the Great Lakes

without a jury, but a jury demand has not been invoked in any contested case that we know of. The case at bar is the only decision squarely on the point, but there are a host of cases involving maintenance and cure which show as a matter of general principle that the Court of Appeals decided the case at bar correctly.

The short and summary answer to the Petition is that the decision of the Court of Appeals below is not in conflict with any decision of this Court or of any other court, that the question presented is not one of general public importance, and that the two lower courts decided this case correctly.

Wherefore it is respectfully requested that the Petition for Writ of Certiorari be denied.

STUART B. BRADLEY,
135 S. LaSalle Street,
Chicago 3, Illinois,
Counsel for Respondent.

SEAGO, PIPIN, BRADLEY & VETTER,
135 S. LaSalle Street,
Chicago 3, Illinois,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 398 MISC.

JOHN T. MILLER,

Petitioner,

vs.

STANDARD OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

S. ELDRIDGE SAMPLINER and
VICTOR G. HANSON,
301 Caxton Building,
Cleveland, Ohio,

ROBERT F. DOYLE,
514 West North Avenue,
Chicago 10, Illinois,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 398.

JOHN T. MILLER,

Petitioner,

vs.

STANDARD OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, John T. Miller, respectfully prays for a rehearing of the order of this Court dated April 27, 1953, denying his petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BASIC FACTS.

This is an action by a seaman for maintenance and cure in which said seaman made a timely demand for a jury trial by authority of The Great Lakes Statute, 28 U. S. C. A. Sec. 770; Sec. 28 U. S. C. 1873, June 25, 1948, C. 646, 62 Stat. 953. The petitioner's demand for a jury trial under the above statute was denied by the United States District Court for the Northern District of Illinois, Eastern Division.

The Honorable Mr. Justice Black and Mr. Justice Douglas are of the opinion the petition should be granted.

This case is one of general public importance because it involves the cherished right of trial by jury. And the decision below constitutes a misinterpretation of the purpose and effect of the Great Lakes Statute.

Through no fault of your petitioner due to publication difficulties your petitioner's Reply Brief was not received by the Office of the Clerk of the Supreme Court of the United States until four days after this Honorable Court had denied the petition for Writ of Certiorari. The petitioner, libelant found it necessary to make a Reply Brief because the respondent in its Brief in opposition to the Petition for Certiorari either intentionally or carelessly miscited various Federal Court decisions.

Therefore your petitioner prays the indulgence of this Honorable Court in the consideration of the substance of the material the petitioner had prepared for the determination of this Court in the Reply Brief of Petitioner.

It would be difficult to exaggerate the necessity for a decision on the merits of the meaning and effect of the Great Lakes Jury Statute and the interpretation to be given to a cause of action for maintenance and cure, as a means of avoiding constant litigation and relitigation of the same substantial point. This Court has often cautioned that its denial of Petition for Certiorari is not to be construed as a decision on the merits. That being so attorneys will continue to resist the denial of a right to trial by jury until the merits of the Great Lakes Jury Statute involved has been finally adjudicated.

STATEMENT.

It is claimed in the Respondent's Brief, that the rights of a seaman in any given case to maintenance and cure exist regardless of any meeting of the minds. This statement is manifestly untrue, because when the ship owner contracts to employ an individual as a seaman he is, or should be, cognizant of any and all existing laws that become a part of this contract of employment. One of the duties imposed by law is the duty on the part of the ship owner to provide maintenance and cure. Therefore, a ship owner such as the respondent, who contracts with a seaman, is aware or should be aware that he must live up to this agreement imposed by law. The ship owner voluntarily enters into this contract of employment with the seaman, knowing full well the existing laws which become a part of this contract, and therefore the ship owner in effect makes the promise to provide maintenance and cure as part of the contract. No one forces this ship owner into contracting to employ a seaman, but he does so with a desire of promoting his own economic interests. If the ship owner claims that there was no meeting of the minds of the parties, by in effect claiming ignorance of all existing laws affecting a seaman's contract, then the law will step in and imply a contract. This theory is certainly not new in the field of contracts as the law in many instances steps in and rules that if the one party did not realize one of the aspects of his contract, he should have. These cases can hardly be called anything but contract cases. In the case of the seaman this right to maintenance and cure never exists unless it is proven that the relationship of seaman and ship owner exists. And therefore maintenance and cure has its very creation in the contract of employment, and thus becomes a part of the contract of employment between the ship owner and seaman.

The respondent claims that there is no conflict in the opinion of the Court below, and the decisions of the Sixth and Ninth Circuits and various District Courts, because it claims none of the cases cited bring into issue the question of the Great Lakes Jury Trial Statute. The petitioner maintains there is a conflict because the Lower Court found that all elements necessary to place the case under the Great Lakes Statute were established in the record by the petitioner, except the Lower Court found the petitioner's suit for maintenance and cure was not a contract or tort action within the meaning of Section 1873 of the Judicial Code of the United States of 1948. Therefore the only issue the Court of Appeals left to be decided was whether or not maintenance and cure is a contract or tort action and thus covered by the Great Lakes Jury Statute. As the Lower Court based its entire decision on the fact that maintenance and cure is not a contract or tort, other Federal Court's decisions respecting the meaning of maintenance and cure become relevant. The respondent's claim regarding these decisions is absurd to say the least because they themselves in the Lower Court brought into issue the various courts decisions on the meaning of maintenance and cure, and none of their decisions directly involved the Great Lakes Jury Statute.

The respondent's fear that his expense in contesting the rights of seaman might be increased, could be avoided by a more humane handling of seamen's claims. The respondent claims that the ancient prerogatives of admiralty are to be preserved can be best answered by reviewing a history of the many changes that have already taken place in the admiralty practice.

The Admiralty Court procedure is a body of international and substantive and procedural law descended from ancient Mediterranean law.

When the United States became a nation, international maritime trade was essential to its existence. Framers of the Constitution believed that successful American participation in international trade required uniformity of doctrine and procedure in admiralty law. Accordingly, the Constitution vested in the Federal Government power, subsequently interpreted to be exclusive over admiralty suits. To achieve conformity with admiralty courts of other nations, Congress instructed the courts to proceed according to the international Civil Law as it had been developed and modified by the English Admiralty Courts and the Colonial Vice-Admiralty Courts.

Since the initial acceptance of the Civil law, admiralty law has gone through a process of Americanization. The Procedure has been transformed by Congress and the courts from an awkward mine of anglo-admiralty practice to a procedure more suited to the administration of justice in our own Federal Court system. Congress has provided for a mode of proof unlike that of the Civil Law; it has changed the scope of appellate review; it has empowered the admiralty court to grant injunctions; it has provided a jury trial in admiralty; and it has set up limitation of liability proceedings which have no analogue in the Civil Law practice of 1789. The petitioner's claim for the protection of the ancient and logical prerogatives of admiralty has a singular interest among ship owners who might desire to unjustly contest seamen's claims with the security that their contest would involve the minimum of expense.

ARGUMENT.

Point I.

The respondent in commenting on *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, neglected to mention that the case referred to maintenance and cure as a contractual right.

The cases of *Harden v. Gordon*, 11 Fed. Cas. 480, No. 6047; *Cortes v. Baltimore Insular Line*, 287 U. S. 367, and *Calmar S. S. Corp v. Taylor*, 303 U. S. 525, are all relevant to the case at bar because they clearly show the meaning and effect of an action for maintenance and cure. The respondent claims that one experienced individual would be more capable of deciding these cases is in conflict with our entire judicial procedure, which is predicated on reverence for a trial by jury. Of course any change in this Great Lakes Jury statute is a matter of legislation.

When the Courts refer to seamen as "Wards of the Admiralty," they are referring to the fact that Admiralty Law must protect the seaman; therefore an interpretation of this term, such as propounded by respondent, that takes away a right, is not in harmony with the law.

The Lower Court on page 4 of their opinion held that all elements to place this case under the Great Lakes jury statute were established in the records, except they decided that maintenance and cure was not a contract or tort action; therefore the cases that refer to maintenance and cure as a contract or tort do conflict with the Lower Court's holding.

Points II and III.

Runyan v. Great Lakes Dredge & Dock Company, 141 F. 2d 396, which was decided in the Sixth Circuit, describes maintenance and cure as a contract action, and the *City of Avalon*, 156 F. 2d 500, decided by the Ninth

Circuit are also in conflict with the Lower Court's interpretation of an action for maintenance and cure for the same reasons set forth in Point I, above.

The cases cited by petitioner decided by the various District Courts are also relevant for the same reasons as set forth in Point I, of this reply brief. However the respondent has, in referring to *Sperbeck v. A. L. Burbank & Co.*, 88 F. Supp. 623, made a statement in Point 4 of its brief, that falsifies the opinion of the Court in that case.

The respondent's statement in its brief in referring to the *Sperbeck* case is as follows:

> "The opinion discusses the nature of maintenance and cure and reaches no conclusion as to whether it is contractual, delictual or 'something else.' "

While we do not wish to bother this Court with the problem of improper briefing of cases, we do feel that the respondent has so flagrantly misquoted the opinion of the Court that it leaves us with no other alternative.

In order to clarify the matter the following is a direct quotation from the opinion of District Judge Rifkind in the *Sperbeck* case:

> "The second question is whether the claim for maintenance and cure abated on Sperbeck's death. No answer to this question has been provided by the authorities. Counsel inform me that diligent search has not discovered a case directly in point. The argument has therefore taken a turn toward the classification of the claim for maintenance and cure as contractual, delictual or belonging to an independent category. Of that, too there is no clearcut determination. When the legal materials are as plastic as they are on this question the forms of logical deduction are illusory since the desired conclusion is surrepti-

> tiously introduced into the premises. It may as well, therefore, be done candidly. *Preferring to hold that the claim for maintenance and cure does not abate at the death of the seaman entitled thereto, I choose to classify the claim pro hac vice as contractual. Authority for my choice I find in the language of Cortes v. Baltimore Insular Line,* 1932, 287 U. S. 367, 371, 53 S. Ct. 173, 174, 77 L. Ed. 368, *"Contractual it is in the sense that it has its source in a relation which is contractual in origin."* (Pages 625 and 626.)

In answering the remaining portions of the respondent's brief, reference will be made to the case and page number as it appears in respondent's brief.

On page 7 of respondent's brief, it cites the case of *Frank J. Fobert,* 32 F. Supp. 214 (W. D. N. Y. 1940), where the Court held that the Great Lakes Jury Statute is applicable only when navigation is between places in two or more states, each of which is upon one of the Great Lakes or navigable waters connecting them. In the case at bar, the United States Court of Appeals, in their decision after reviewing the facts in the case decided on page 4 of their decision, said in effect, that the respondent's vessel was enrolled and licensed for the coasting trade and was employed in commerce and navigation between places in different states and upon the lakes and navigable waters connecting such lakes.

Respondent cites the case of *Gillet v. Pierce,* 10 Fed. Cas. 388, No. 5437 (E. D. Mich. 1875). This case does not support the respondent's contention because in that case there appeared nowhere in the pleadings that the vessel concerned was enrolled and licensed for the coasting trade. The Court's criticism in this case, of the Great Lakes Jury Statute, should be lightly considered in view of the fact that the Circuit Court of Appeals for the Second Circuit

in the later case of *The Western States,* 159 F. 354 (2 Cir. 1908), clearly upheld the Great Lakes Jury Statute.

The Erie Belle, 20 F. 63 (E. D. Mich. 1883), cited by respondent on page 8 of its brief is another application by the Court of the Great Lakes Jury Statute.

On page 8 of respondent's brief it claims that in the case of *The Western States,* 159 F. 354, that the decree of the trial judge reducing the jury's verdict of $15,000 to $5,000 was affirmed. This statement is incorrect which is readily seen by a cursory reading of the decision of the Second Circuit on appeal. Upon appeal, the Second Circuit held the jury's verdict to be binding upon the Trial Judge, *but upon the theory that appeals in admiralty are trials de novo,* the Second Circuit held that it had the power to, and did assess damages at $5,000.00. Professor James William Moore in *Moore's Federal Practice,* Second edition, Volume V (1951) page 277, comments on *The Western States* decision and the *Genesee Chief* (1851), 53 U. S. (12 How.) 443, 13 L. ed. 1058:

> "From the arguments before the Supreme Court in The Genesee Chief and the discussion of the Court in that case, it seems clear that Congress intended to grant a jury trial as of right because of assumed constitutional necessity, since it thought, albeit erroneously, that it was operating under the commerce power. What Congress granted then was jury trial commensurate to jury trial under the Seventh Amendment even though that Amendment in fact does not apply. The Court in the Genesee Chief states that Congress had altered the 'mode of procedure' in admiralty by the introduction of trial by jury therein. Did Congress intend to alter the 'mode of procedure' only at the Trial Court level? Apparently the Second Circuit (in the Western States) case thought so for it exercised its customary ad-

miralty appellate powers under the trial de novo theory relative to admiralty appeals. With deference, we disagree. It seems odd to believe that Congress intended to give with one hand at the trial court level what could be taken away at the appellate level, when Congress thought it was operating subject to the limitations of the Seventh Amendment. Presumably it intended to give a jury trial commensurate to that guaranteed by the Seventh Amendment. From this it would follow that the verdict of a jury in a case arising in contract or tort under 28 USC 1873, is not advisory, but has the same effect at the trial and appellate levels as a verdict in a common law action; and any fact determined by the verdict may not be re-examined, at either level, other, than according to the rules of the common law."

On page 9 of the respondent's brief it is forced to admit that the case of *Sellon v. Great Lakes Transit Corporation,* 87 F. 2d 708 (2 Cir. 1937), does involve an action for maintenance and cure and there was a jury trial granted under the Great Lakes Jury Statute. In a desperate attempt to avoid the effect of this decision, the respondent claims that this opinion does not show whether there had been any objection to the jury trial.

On page 9 of the respondent's brief it cites the case of *Dryden v. Ocean Accident & Guarantee Corp.,* 138 F. 2d 291, 293: This case was decided by the same Court that this appeal is taken from. That case involved in a sense the protection of a seaman's right to maintenance and cure. In that case the defendant employer was seeking to have its insurer defend a seaman's suit for maintenance and cure on the grounds that the seaman's claim was a "liability imposed by law," and therefore covered by the insurance policy. The Court in effect held that

maintenance and cure was a contract but that it was also a "liability imposed by law." The Court discussed the duty of the ship owner to provide maintenance and cure, but the actual decision merely held that the clause in the insurance policy covering "liability imposed by law," was sufficiently broad enough to cover an action for maintenance and cure. But the Court of Appeals for the Seventh Circuit in the case at bar have digressed considerably from their earlier decision in holding that maintenance and cure is not a matter of contract or tort.

The respondent in its brief relies heavily on the case of *Gillet v. Pierce,* 10 Fed. Cas. 388, No. 5437 (E. D. Mich. 1875), where a jury trial was denied because the pleadings did not show the vessel was enrolled and licensed, for the coasting trade. This case cannot possibly support their contention because the lower court in the case at bar, found that the vessel was enrolled and licensed for the coasting trade. In fact, the case supports the petitioner's contention by implying that a jury trial would have been granted in the *Gillet* case, if the pleadings showed that the vessel was licensed for the coasting trade. The criticisms of the Great Lakes Jury Statute by the Court in the *Gillet* case above, do not in any way affect its application or legality. If any changes are to be made in the Great Lakes Statute it is a matter for Congress to take into consideration, and criticisms of this Statute should be channeled in that direction. Congress has seen fit to keep this legislation on the books and for no other purpose but to protect seamen. It certainly cannot be claimed that this legislation was enacted to protect individuals other than seamen, to the exclusion of seamen. It was intended by Congress to encompass all possible claims of seamen by using the words Contract or Tort.

The respondent in its brief cannot understand why there are so few cases involving the Great Lakes Jury Trial Statute. This fact can best be explained from the fact that seamen are quite aware of the maritime laws' rigid protection of their rights. And, therefore, in many instances feel more secure when the decision rests in the admiralty courts. The Courts have made it clear that they intend to protect these rights. The seaman, being an integral part of the International Maritime trade, which is essential to the United States, must be given every protection necessary to his survival.

Another reason why very few cases regarding the Great Lakes Statute have been presented is because Congress, desiring to more fully protect the seaman, enacted the Merchant Marine (Jones) Act of 1920; 46 USC 688. The cases hold that the Jones Act claim and the claim for maintenance and cure may be joined in one action. Therefore, as the Jones Act provides for a trial by jury, the seaman may demand a jury if he so desires. Thus there is no need to rely on the Great Lakes Jury Statute, in most instances. But in the case at bar, as the Jones Act claim was barred, the seaman had to enforce his rights for maintenance and cure in admiralty, and after showing that all the elements necessary to place the case under the Great Lakes Jury Statute were present he demanded a trial by jury. Granted, in many instances the facts that place a case under the Great Lakes Statute are not present, and in most instances, the seaman proceeds under the Jones Act, 46 USCA 688, but still, when a seaman's case meets the requirements of the Great Lakes Statute, and he so desires to have the case tried by a jury, he should be allowed this right, given him by law.

Legislation favoring seamen is predicated on the philosophy set forth in one of the earliest cases on the subject of maintenance and cure:

> "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labors; they are generally poor and friendless, and acquire habits of gross indulgence, carelessness and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness." *Harden v. Gordon,* 2 Mason 541, 11 Fed. Cas. 480-9, 10.

As previously mentioned the petitioner's contention finds support in the case of *Cortes, Administrator v. Baltimore Insular Line, Inc.,* 287 U. S. 367, where Justice Cardozo said the duty to provide maintenance and cure is contractual in the sense that it has a source in a relation which is contractual in origin. The Court further stated in that case:

> "We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more."

Quite notably the respondent's brief is absent of any explanation of the opinion in the *Cortes* case. The *Cortes* case was cited as authority in *Sperbeck v. A. L. Burbank & Co.,* 88 F. Supp. 623, when that case also held that maintenance and cure was a contract.

CONCLUSION.

For the foregoing reasons, petitioner respectfully prays that the order of this Court denying his petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit be reheard and vacated and that the petition be granted.

Dated: May 11, 1953.

S. ELDRIDGE SAMPLINER,
VICTOR G. HANSON,
301 Caxton Building,
Cleveland, Ohio,

ROBERT F. DOYLE,
514 West North Avenue,
Chicago 10, Illinois,
Attorneys for Petitioner.

Certificate of Counsel.

The undersigned, S. Eldridge Sampliner, attorney for Petitioner, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 33 as amended, and that said petition for rehearing is not interposed for delay.

S. ELDRIDGE SAMPLINER,
301 Caxton Building,
Cleveland, Ohio,
Attorney for Petitioner.

FILED
MAR 11 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 651

HARRY SCHENNAULT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

GEORGE F. CALLAGHAN,
105 West Adams Street,
Chicago 3, Illinois,
Attorney for Petitioner.

MYER H. GLADSTONE,
134 North La Salle Street,
Chicago 2, Illinois,
Of Counsel.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Harry Schennault, prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit which was entered in this case between the above named parties on December 20, 1952, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division. The petition for rehearing was denied on February 9, 1953.

THE OPINION BELOW.

The Circuit Court of Appeals for the Seventh Circuit affirmed the judgment sentencing the Petitioner to the custody of the Attorney General for a period of five years

on Count 12 of the indictment and fined him $2,000.00 on said Count, and to the custody of the Attorney General for a period of seven years on Count 13 of the indictment and fined him $5,000.00 on said Count; it was adjudged that the sentences run consecutively.

The opinion has not yet been reported. It appears in the record at pages 156-162.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Where an indictment consists of thirteen Counts, containing five groups of separate, independent transactions, each provable by different evidence, and where after motion made, and order of Court, the Government elected to proceed on a group of two Counts of the indictment, whether the effect of such election was not an abandonment, dismissal, or *nolle prosequi* of the remaining eleven Counts of the indictment.

2. Whether a rule of law announced by the Court of Appeals for the Seventh Circuit that "Criminal cases in the Federal Courts are governed by Federal Statutes and Federal decisions, and State Statutes and State decisions are inapplicable" is not such bad law as to require correction by the Supreme Court.

3. Whether accusation of a crime made by police to a prisoner is admissible in evidence or should be considered by the Trial Court against the defendant, where he fails to make denials of said accusation.

4. Whether narcotics found by Government agents in an unoccupied store, formerly in possession of a third person,

can be said to be possessed by the lessee of the said store without proof of any knowledge on his part of the presence of said narcotics in the said premises.

SUMMARY STATEMENT OF MATTER INVOLVED.

The record is quite long but the facts necessary to a disposition of this proceeding may be recited quite briefly.

The Petitioner was ~~tried~~ indicted in the District Court for the Northern District of Illinois, Eastern Division on thirteen Counts, divided into five groups of transactions, all charging a violation of the narcotic laws. The first three Counts charged the Petitioner with possession of 16 grains of heroin not in the original stamped package, with a sale of the said 16 grains of heroin and with knowingly possessing 16 grains of heroin imported into the United States contrary to law. The fourth, fifth and sixth Counts charged the same series of crimes with respect to 2.4 grains of heroin and 2 grains of cocaine, committed on June 26, 1951. Counts 7, 8 and 9 charged the same series of crimes with respect to 7.7 grains of heroin, committed on July 2, 1951. Counts 10 and 11 charged the same crimes, except for a sale, of 6,005.4 grains of heroin and 188.1 grains of cocaine, committed on April 10, 1951.

Counts 12 and 13 charged the same crimes, except for a sale, of 24.8 grains of heroin, committed on October 10, 1951.

The respective sales were made to different persons.

The Petitioner made a motion to compel the Government to elect the group of Counts on which it would go to trial, and pursuant to the order of Court to make an election, the Government elected to proceed on Counts 10 and 11 of the indictment. The Petitioner went to trial on the said Counts before the Honorable Philip L. Sullivan, who found him not guilty on said Counts.

The Petitioner was then tried on Counts 12 and 13, before the Honorable Patrick T. Stone, without a jury. Before the trial commenced, the Petitioner's attorneys objected to proceeding to trial on any of the Counts in the indictment; the motion was denied.

The important and essential facts are as follows: On October 10, 1951, at about 1:30 A. M., the Petitioner was standing outside of the doorway of a store of which he was the lessee. For a long time prior thereto the store had been occupied as a poultry store but was closed upon orders of the Chicago Board of Health the last two or three weeks. Three Chicago policemen passing by at the time entered the store and found a box located inside of a refrigerator showcase. In that box they found about 24 grains of heroin, which were not in the original stamped package nor from the original stamped package.

The Petitioner was arrested and at a branch of the Chicago police station, a Federal Narcotic Agent Christoph said to Harry Schennault, "Well, we finally got Harry Schennault, King of the dope peddlers" (Rec. 76). "Now with you out of the way we will have the second best man out of the way; we removed Amos Jones and you will follow" (Rec. 80). In response, the Petitioner just laughed (Rec. 80). The Agent continued, "Well, you have peddled these narcotics on the South side for a long time, and a lot of people have gone to jail for you, you put them out in front, you are peddling these narcotics on the South side, and I think this time it is your turn" (Rec. 81). The Petitioner laughed and made no comment.

Petitioner's attorney moved to have the foregoing testimony stricken and the Court replied, "It is perfectly proper. Objection overruled" (Rec. 81). With respect to the foregoing testimony the Court, at the time of the finding of guilty and of sentence, stated:

"And what did Schennault say? He said nothing.

> If I charged you with that offense you would be the first one to deny it; but not a word from Schennault'' (Rec. 133).

The Petitioner did not operate the poultry store himself but employed one, Henry Morgan, to do so (Rec. 99). The Petitioner came around only on week-ends to check the cash. The license of the poultry store had been in the name of Morgan since 1949 because he operated the business (Rec. 111). The Petitioner was the lessee, owned the equipment and paid the rent (Rec. 111).

Immediately after the Trial Court found the defendant guilty, he asked the District Attorney, ''What is this man's reputation?'' (Rec. 130). The District Attorney stated:

> ''This man is one of the largest peddlers, this man is a known dope peddler on the South side of Chicago, and has been for a number of years; and his method of operation is to have others dispense the narcotics, and he is behind the scenes so to speak, and he is the largest source of supply, according to the information I have, and the narcotic agents so say, if your Honor cares to interrogate them, on the South side, and the Government in this case is recommending the maximum sentence as to this defendant'' (Rec. 130, 131).

Then Mr. Christoph spoke up and said:

> ''He is notorious on the South side, and as I say, he is in the same category as Amos Jones, who had run the narcotics business on the South side for a long time; and his activities have been interstate and international, they extended to New York; we have information that he purchased narcotics from New York; and we have information of a person that was arrested in New York who delivered to Harry Schennault; and there have been about ten people who have gone to jail on behalf of Harry Schennault; there is a Sweet Willie and Delphine McGee who went to jail, as I mentioned on the stand, that was his woman, and at the time we entered the premises it was his premises.''

"The Court: That is, Harry Schennault?

"Mr. Christoph: Yes, sir, and his clothing was in there and receipts and everything; and she operated a shop for Harry Schennault at that time. The chicken shop has just been a front. The man is operating four or five automobiles, and he has no noticeable employment. Every time we would pick up a person involved in narcotics the name of Harry Schennault comes up as their source of supply, or in some connection with the source of supply" (Rec. 131).

Mr. Christoph called the Court's attention to the fact that Lieutenant Healy of the Narcotics Squad was present and that he had a large amount of information on Harry Schennault. The Clerk of Court asked the Judge whether he wanted Lieutenant Healy sworn, but the Court replied, "No, this is a pre-sentence investigation" (Rec. 132). The Court then asked Lieutenant Healy what he knew about Harry Schennault, and Lieutenant Healy replied:

"He is supposed to be known as the 'king of the dope peddlers' out on the South side, and various people I have talked to in the last few years down there have implicated him in the dope racket. One of the peddlers, Freddie Anderson, got four to eight years last July; he said he was working for Schennault. We had a girl who also told us she knew Schennault; and recently I had a girl in there by the name of Letha Harrison, one of his old girl friends, she said she had gone out with Schennault, had been picked up by him at various places.

"The Court: In your opinion he is one of the big operators in that locality?

"Lieutenant Healy: That is right." (Rec. 132.)

Contemporaneously with the pronouncement of sentence, the Trial Court said, "This is a very serious matter. I don't know of any worse crime, where he is destroying the lives of children. When you think of the children, men

like you destroying them by teaching them to use narcotics, the sooner you are removed from society, the better that society will be'' (Rec. 136).

REASONS FOR ALLOWANCE OF THE WRIT.

1 AND 2.

The Petitioner contended and argued, both in the Trial Court and in the Court of Appeals, that, after the Government had elected to proceed on Counts 10 and 11 of the Indictment, pursuant to an order of Court directing the Government to make an election, which order was entered on a motion of the Petitioner for that purpose, the effect of such an election was an abandonment, dismissal or *nolle prosequi* of the eleven remaining Counts, so as to bar a trial on Counts 12 and 13, the Counts on which the Petitioner was found guilty.

The Petitioner cited the following decisions as authority for that rule: *Mills* v. *State*, 52 Ind. 187, 188; *State* v. *Rush*, 27 P. (2d) 581, 584, 138 Kans. 465; *State* v. *Bodoin*, 96 So. 501, 503, 153 La. 641; *Kinney* v. *State*, 214 P. (2d) 726, 727 (Okla.); *State* v. *Reed*, 39 P. (2d) 1005, 1006; *People* v. *Tinnell*, 385 Ill. 537, 540; *Gilliam* v. *State*, 96 S. W. (2d) 86, 88 (Tex. Ct. App.); 1 Bishop Crim. Pro. Sec. 455, 456.

The Court of Appeals, in its opinion, said:

> ''Criminal cases in the federal courts are governed and controlled by federal statutes and federal decisions, and state statutes and state decisions are inapplicable. *United States* v. *Reid*, 53 U. S. 360-365; *Starr* v. *United States*, 153 U. S. 614; *Jones* v. *United States*, 137 U. S. 211, and *Simmons* v. *United States*, 142 U. S. 148.'' (Rec. 159.)

The decisions of the Supreme Court cited by the Court of Appeals do *not* announce that rule and are *not* authority

for such a rule. This rule is so startlingly erroneous that it requires correction by this Court, since it appears that, in hundreds of Federal criminal cases, Federal Courts of Appeal and the Supreme Court of the United States follow and cite State decisions and even decisions of the Courts of England. The cases named by the Court of Appeals as authority for the rule cite and follow State and English cases. In *Jones* v. *United States,* 137 U. S. 211, this Court cited a Massachusetts case at page 212, a number of English cases at page 213, a Rhode Island and a Maine decision at page 214. This Court, in the case of *Star* v. *United States,* 153 U. S. 613, followed a New Hampshire and a South Carolina decision, and followed a rule of the English Courts and of the Court of Pennsylvania (page 626) on the question whether a Trial Court may express an opinion on evidence in the giving of instructions.

In the recent case of *Gordon* v. *United States,* ..... U. S. ....., 97 L. Ed. (Advance p. 289), this Honorable Court, on the question as to whether an accused is entitled to the production of documents in the hands of the Government, stated that the reasoning of some holdings on the question, expressed by some lower Federal Courts, is outweighed by that of "highly respectable authority in State and lower Federal Courts in support of the view that an accused is entitled to the production of such documents." This Honorable Court found it "hard to withstand the force of Judge Cooley's observation in a similar situation" appearing in *People* v. *Davis,* 52 Mich. 569, 573. This Honorable Court cited and followed not only this Michigan decision but a Nevada and two New York decisions.

It is manifest that the rule announced by the Court of Appeals, to the effect that State decisions are inapplicable to Federal criminal cases, is so palpably and manifestly erroneous that it should be corrected by this Court.

Among the many decisions relying upon State opinions is that of *Willsman* v. *United States,* 286 F. 852. In determining the general rule that "Possession, to be incriminating, must be personal and exclusive," the Court cited no Federal cases, but mentioned five State decisions as bearing on the point (page 855).

The Court of Appeals, in discussing two other cases cited by the Petitioner, *Cochran* v. *United States,* 41 F. (2d) 193, and *Todd* v. *United States,* 48 F. (2d) 530, stated:

> "The federal cases cited by appellant are *Cochran* v. *United States,* 41 F. 2d 193, and *Todd* v. *United States,* 48 F. 2d 530. Neither is relevant to the proposition here under consideration. As a matter of fact, *Cochran* v. *United States* is referred to by the editor of Corpus Juris Secundum in a discussion on 'the effects of election' in 42 C. J. S., page 1158, as supporting the italicized portion of the following sentence:
>
> > 'The election to proceed on one count is held equivalent to a verdict of not guilty on the other counts, but not in the sense that it will bar prosecution on the remaining count which is similar to, or substantially the same as, those rejected.' "
>
> (Rec. 159.)

Here again the Court of Appeals grossly misinterpreted the rules announced in the foregoing authorities. The *Cochran* case was cited to show the effect of a *nolle prosse* and held, citing *Dealy* v. *United States,* 152 U. S. 539, 14 S. Ct. 670, 681, 39 L. Ed. 545, that where a count is *nolled,* it leaves the prosecution as though no such count had ever been inserted in the indictment.

In quoting 42 C. J. S., page 1158, the Court of Appeals overlooked the sentence just preceding the sentence which it cited. This overlooked portion states, "An election cures the defect arising from the multifarious character of the indictment, and eliminates or withdraws the rejected counts."

The Court of Appeals has so misinterpreted the effect of, and the language used in, the case of *Cochran* v. *United States* and that used in 42 C. J. S., page 1158, so as to require correction by this Court.

The Court of Appeals further quoted Rule 14 of the Federal Rules of Criminal Procedure as further authority for its conclusion that no error intervened by putting the Petitioner to trial on Counts 12 and 13 after an election had been made to proceed on Counts 10 and 11, on which the Petitioner had been found not guilty. Rule 14 reads:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election, or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

With respect to a trial on an indictment involving a single defendant, the Rule states that the Court may grant relief from prejudice by two methods: (1) The Court may order an election, or (2) The Court may order separate trials of Counts. The Trial Court ordered an election, and an election was made by the Government to proceed on Counts 10 and 11. Separate trials of the Counts were not ordered. It must have appeared to the Trial Court that the defendant was prejudiced by a joinder of the offenses.

This Honorable Court should construe the said Rule 14 for the purpose of determining whether an order directing an election of Counts and an order directing separate trials of Counts mean the same thing or different things.

As petitioner has heretofore pointed out, at the time he was arrested and was in custody at a branch station of the Chicago police, a Federal Narcotic Agent Christoph said to Harry Schennault, "Well, we finally got Harry Schennault, King of the dope peddlers" (Rec. 76). "Now

with you out of the way we will have the second best man out of the way; we removed Amos Jones and you will follow" (Rec. 80). In response, the Petitioner just laughed (Rec. 80). The Agent continued, "Well, you have peddled these narcotics on the South side for a long time, and a lot of people have gone to jail for you, you put them out in front, you are peddling these narcotics on the South side, and I think this time it is your turn" (Rec. 81). The Petitioner laughed and made no comment.

Petitioner's attorney moved to have the foregoing testimony stricken and the Court replied, "It is perfectly proper. Objection overruled" (Rec. 81). With respect to the foregoing testimony the Court, at the time of the finding of guilty and of sentence, stated:

> "And what did Schennault say? He said nothing. If I charged you with that offense you would be the first one to deny it; but not a word from Schennault" (Rec. 133).

It is manifest that the statement that Harry Schennault was the king of the dope peddlers is imbedded with the idea that the Petitioner had made many prior illegal sales of narcotics to the extent that he became known as the "King of the dope peddlers". The Court of Appeals, with respect to this testimony, said (Rec. 161):

> "Neither can we find merit in appellant's claim that highly prejudicial evidence and statements were allowed to be introduced in evidence. He says that evidence of the fact that defendant on his arrival at the police station, after his arrest, was greeted by city officers and by a federal employee of the Bureau of Narcotics, as 'king of the dope peddlers' was received, and was improper and prejudicial. We do not consider the admission of this evidence as reversible error in view of the convincing nature of the proof and the fact that the case was tried before the court."

There is no doubt that this prejudicial testimony was

considered by the Trial Court and deeply influenced him in his finding that the Petitioner was guilty.

The holding of the Court of Appeals that the foregoing evidence is not reversible error is in conflict with the decisions of the Courts of Appeal, particularly the decision in the case of *United States* v. *Lo Biondo*, 2 Cir., 135 F. (2d) 130, *Yep* v. *United States*, 10 Cir., 83 F. (2d) 41 and *McCarthy* v. *United States*, 6 Cir., 25 F. (2d) 298, which hold "to draw a derogatory inference from mere silence is to compel the respondent to testify; and the customary formula of warning should be changed, and the respondent should be told, 'if you say anything, it will be used against you; if you do not say anything, that will be used against you.' "

III.

The entire evidence with reference to possession of the narcotics by the Petitioner is as follows: On October 10, 1951, at about 1:30 A. M., the Petitioner was standing outside of the doorway of a store of which he was the lessee. This store had been occupied for a long time as a poultry store. The Petitioner did not operate the store himself, but employed one, Henry Morgan, to do so (Rec. 99). The Petitioner came around only on week-ends to check the cash. The license of the poultry store had been in the name of Morgan since 1949 because he operated the business (Rec. 111). The Petitioner was the lessee, owned the equipment and paid the rent (Rec. 111). About two or three weeks prior to October 10, 1951, the store was closed upon orders of the Chicago Board of Health and remained unoccupied during that period. On the morning of October 10, 1951, three Chicago policemen passed by and entered the store and made a search. They found a box located inside of a refrigerator showcase and in that box found the 24 grains of heroin described in the indict-

ment. At the time of the search the Petitioner had accompanied the policemen into the store. At the time the officers took the box from the refrigerator showcase, the Petitioner objected to the search.

The reason the Petitioner was on the premises was because a friend, Emmett Spruell, had called him because Spruell had had a suitcase in the store with some clothes there and had gone to the store to get them but couldn't lock the door. It was for the purpose of locking the door that the Petitioner went to the premises (Rec. 100).

The foregoing constituted substantially all of the evidence introduced by the Government and the defendant with reference to the possession of the narcotics by the Petitioner and with reference to his knowledge that the heroin was on the premises.

Without any discussion or analysis of the evidence, the Court of Appeals stated that its examination of the transcript satisfied it beyond a shadow of a doubt that the Petitioner actually did have possession of narcotics as charged in Counts Twelve and Thirteen and that the proof was of a convincing nature (Rec. 161). This finding is in conflict with the rules, concerning possession and knowledge of possession, as announced by Courts of other circuits holding that possession of the fruits of crime, involves knowledge, dominion and control, with plenary power of disposal in the alleged possessor. The decisions of these Courts of Review, in which the opinion of the Court of Appeals for the Seventh Circuit is in conflict, are: *Grantello* v. *United States*, 8 Cir., 3 F. (2d) 117, 118, *Patrilo* v. *United States*, 8 Cir., 7 F. (2d) 804, 805, *Colbaugh* v. *United States*, 8 Cir., 15 F. (2d) 929, 931, *Bergedorff* v. *United States*, 10 Cir., 37 F. (2d) 248, 249, *Graceffo* v. *United States*, 3 Cir., 46 F. (2d) 852, 853, *Toney* v. *United States*, D. C., 67 F. (2d) 573, 574, *United States* v. *Wainer*, 7 Cir., 170 F. (2d) 603, 606.

The evidence was uncontradicted that this store had been managed by Henry Morgan, who was present therein until some date two or three weeks before the arrest of the Petitioner. There is no evidence that the Petitioner had been in that store during the two or three weeks in which it was closed and unoccupied. It is just as consistent to say that Henry Morgan possessed the heroin found in the store and left the same there as it is to say that the Petitioner knew that the heroin was in the store and, hence, constructively possessed the same.

The decision of the Court of Appeals is, therefore, in conflict with the holdings of other Courts of Appeal, among which is the case of *Graceffo* v. *United States*, 3 Cir., 46 F. (2d) 852, 853, which states:

> "It has been held by a long line of decisions in substance that, unless there is substantial evidence of facts which exclude every other hypothesis than that of guilt, it is the duty of the trial judge to direct the jury to return a verdict for the accused, and where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against the accused."

The decision of the Court of Appeals for the Seventh Circuit on the question under discussion is also in conflict with the opinion in the case of *United States* v. *Russo*, 3 Cir., 123 F. (2d) 420, 422, and the numerous cases therein cited. In the last cited case, it was held:

> "In a case, therefore, such as the present where there is an utter want of any evidence as to the defendant's knowledge that the property was stolen (except for his constructive possession thereof), an inference of his innocence of any such knowledge is as readily deductible as is an inference of knowledge. It follows therefore that the evidence was insufficient to support a conviction."

IV.

In the summary statement of the matter involved, the Petitioner has set forth the prejudicial, unsworn, hearsay statements of certain persons of whom the Court inquired as to the Petitioner's reputation. The statements were vicious and created a most prejudicial climate and atmosphere surrounding the Trial Court at the time of sentence. It was utterly impossible for the Trial Court to be calm and dispassionate in sentencing the Petitioner, and accordingly, the Court sentenced the Petitioner to imprisonment for twelve years, just three years short of the maximum sentence permitted. The Petitioner realizes that this Court and the Circuit Courts of Appeals do not disturb the sentence imposed by a Trial Court, but in every such case where this rule has been announced, the Trial Court imposed sentence without any vicious and prejudicial statements made to him. The Trial Court, in refusing to try any other of the remaining counts of the Indictment, said, "In view of what I know about this man now, I think he is entitled to a trial before another judge" (Rec. 136). This is a frank admission that the Court was prejudiced against the Petitioner because of the prejudicial hearsay statements made to him, and is equally an admission that he was prejudiced at the time of fixing of sentence.

The Petitioner suggests that this is the first time a situation of this kind is called to the attention of this Honorable Court, and believes that this Court should direct that sentence be passed against a defendant by a Judge who is free from any prejudice against the defendant.

Conclusion.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE F. CALLAGHAN,
Attorney for Petitioner.

MYER H. GLADSTONE,
Of Counsel.

APPENDIX.

Statutes Involved.

Title 21, United States Code, Section 174, so far as pertinent, provides:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or judisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26, United States Code, Section 2553(a) provides:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) (heroin) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as re-

quired by sections 3221 and 3220 shall be *prima facie* evidence of liability to such special tax."

* * * * *

Title 26, United States Code, Section 2557 (b)(1) provides:

"Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court."

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 651

HARRY SCHENNAULT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 156-162) is reported at 201 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1952 (R. 163) and a petition for a rehearing was denied on February 9, 1953 (R. 165). The petition for a writ of certiorari was filed on March 11, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim P.

QUESTIONS PRESENTED

1. Whether the Government, in electing two counts of a 13-count indictment "on which it would go to trial", was precluded from subsequently trying the remaining counts.

2. Whether the trial judge, in a trial without a jury, erred in admitting testimony that petitioner smirked or laughed when accused by narcotics agents of being the head of local narcotics traffic.

3. Whether the evidence is sufficient to support the finding of guilt.

STATUTES AND RULE INVOLVED

The Narcotic Drugs Import and Export Act of February 9, 1909, c. 100, § 2, 35 Stat. 614, as amended, 38 Stat. 276, 42 Stat. 596-597:

> Sec. 2(c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years.
>
> * * * * *
>
> (f) Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evi-

dence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury [21 U.S.C. 174].

Internal Revenue Code:

Sec. 2553(a) It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax [26 U.S.C. 2553 (a)].

Sec. 2557(b)(1) Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court [26 U.S.C. 2557(b)(1)].

Rule 14, F. R. Crim. P.:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court

may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Seventh Circuit (R. 163) affirming the judgment of the District Court for the Northern District of Illinois (R. 137-138) finding petitioner guilty, after trial without a jury, and imposing consecutive sentences of five years' and seven years' imprisonment, and fines of $2,000 and $5,000, respectively, on counts twelve and thirteen of a 13-count indictment charging violations of laws relating to narcotics.

In the first nine counts of the indictment, petitioner was charged with three offenses on each of three dates, i.e., March 27, 1950, June 26, 1951, and July 2, 1951, the offenses consisting of purchase and possession of narcotics not in or from a stamped package (counts one, four, seven), sale of narcotics not in pursuance of the required written form of order (counts two, five, eight), and dealings with narcotics known to be unlawfully imported (counts three, six, nine), in violation of 26 U.S.C. 2553(a), 26 U.S.C. 2554(a), and 21 U.S.C. 174, respectively (R. 3-5). In counts nine and ten petitioner was charged with purchase and possession, and dealings with respect to 6005.4 grains of heroin and 188.1 grains of cocaine on April 10, 1951 (R. 6-7) and in counts twelve and thirteen he was charged with the same offenses as to 24.8 grains of heroin on October 10, 1951 (R. 7).

On the date set for trial, petitioner moved to compel the Government "to elect the group of counts on which to go to trial" and the Government elected "to proceed" on counts ten and eleven (R. 8). Before so proceeding, however, the Government was informed by the trial judge that trial of those counts would not be a "bar" (R. 13).

Petitioner, upon trial on counts ten and eleven, was found not guilty (R. 10). The cause was reassigned to another trial judge (R. 10-11), petitioner waived trial by jury (R. 11), and upon the Government's informing the court that it would proceed as to counts twelve and thirteen, petitioner reiterated an objection, made before the preceding judge, to trial of any further counts of the indictment (R. 12-13). The objection was overruled (R. 13).

The testimony of three police officers disclosed that, in driving on patrol in their district at one-thirty in the morning of October 10, 1951, they observed petitioner standing in the doorway of an empty, dark poultry store, his car standing by with motor running. The police officers swung back after a block or so, saw petitioner still there, alighted, and inquired. Petitioner stated that the store was his own store and that he was closing it up or "checking it up" (R. 14-15, 19, 35, 39-40, 45-46).

The officers searched petitioner. They saw no one else present. The door of the store was unlocked and the officers investigated the store. They observed a box in a refrigerator-counter. Peti-

tioner sought to hold the lid down against one officer, stating, "Wait a minute, you can't go in there" (R. 15, 27-28, 35-36, 47). The officers nevertheless took out the box and discovered that the box contained envelopes, measuring cups and other implements associated with the dispensing of narcotics (R. 15, 24-25, 29, 36, 38, 42, 47-48). Later analysis of the contents of one envelope disclosed 24.8 grains of heroin (R. 94-95).

Federal Narcotics Agent Gayles testified that he was present at an interview with petitioner at the police station, later on the same day, at which another agent Christoph stated "So you finally got Harry Schennault, king of the dope peddlers," to which petitioner responded, "I don't see why you want to say that about me, Christoph," and said, further, "They found that in my store, but they didn't find any narcotics on me." En route in a car to the Narcotics Bureau, the agents asked petitioner what he did for a living and about his four automobiles and real estate holdings. Petitioner responded that he used his head, had a pool room and some other business (R. 69-70).[1] Agent Christoph testified to substantially the same conversations, characterizing petitioner's responses as, "he just laughed" or "smirked" (R. 80-81, 91). He testified that when Gayles remarked about what the police had found, petitioner said "Well, they have got it," and denied that he had seen any narcotics (R. 80-81).

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[1] Petitioner objected to admission of the conversation as mere conclusion. The objection was overruled (R. 69-70).

Petitioner testified that he operated on commission a barber shop with pool room in the rear, and that he had rented the poultry store and operated it on commission, but that it had been closed by the Board of Health about a month before the early-morning events here in question (R. 98-99). He claimed that he had come to the store because an acquaintance, Spruell, had obtained the key from him late at night to take out a suitcase he had left in the store the preceding summer and had then phoned petitioner that he could not get the door locked again (R. 100, 112-113). Petitioner claimed that Spruell was still at the store when the officers arrived (R. 113-114) but petitioner did not produce him at the trial although he admitted he knew his address (R. 114). Petitioner had no explanation of the finding of the box except that Morgan, who had run the store for him prior to September, slept in the back "at times" (R. 102). Morgan was not produced at the trial although petitioner had had a letter from Morgan in Mississippi a month before (R. 106). Petitioner denied various details as to statements at the time of the seizure of the box (R. 119) and denied that there were any accusations by narcotics agents or any laugh or smirk in reply thereto (R. 104-105, 107, 117).

ARGUMENT

1. Petitioner contends that the order under which the Government first proceeded to trial on counts ten and eleven precluded any further trial on the remaining counts (Pet. 2, 7-10). The contention

is without merit. Rule 14, F. R. Crim. P. provides not merely one remedy for a prejudicial joinder of offenses but permits the trial court to "order an election *or separate trials of counts* * * * or provide whatever other relief justice requires" (Italics supplied).

The pertinent part of the order here involved reads as follows (R. 8):

> This day * * * the defendant Harry Schennault by his counsel * * * enters herein his motion to compel the plaintiff to elect the group of counts *on which to go to trial* and said motion is heard and the Government elects *to proceed* on Counts 10 and 11 of the Indictment herein. [Italics supplied.]

At the time of the motion the trial judge stated that the trial of counts 10 and 11 "would not be a bar" (R. 13). It is obvious that the word "elect" is used here, not to indicate an "election," as used in the first phrase of Rule 14, but rather a decision as to which of several, separate trials of counts is to come first.[2]

It is thus clear that what was contemplated and what took place was a separate trial of counts ten and eleven. There was no extinction of any remaining counts. Nothing in Rule 14 provides or indicates that when separate trials of counts are ordered and the Government elects which counts shall be tried first, such an election to go to trial

[2] See *United States* v. *Wallace Co.*, 336 U.S. 793, 802-803, in which this Court went to the record to determine the intended scope of a disputed order excluding evidence.

is the sort of election referred to in the first part of Rule 14. An example of the type of election which eliminates the non-elected counts would be a case in which a single transaction could be one of several offenses and, after the evidence is in, an election of one offense is made for submission to the jury; it would then constitute double jeopardy to allow a re-trial of the same facts on a charge of one of the other offenses that had been dropped by the election. Here, however, counts ten and eleven, tried before the trial of the counts now in question, related to a transaction that occurred on April 10, 1951, and involved 6005.4 grains of heroin and 188.1 grains of cocaine. Counts twelve and thirteen, which petitioner claims to have been somehow elected out of existence by trial of counts ten and eleven, related to the events of October 10, 1951, involving 24.8 grains of heroin. The remaining nine counts similarly related to separate dates and quantities of narcotics (*supra,* p. 4). No occasion appears for an election to designate the offense, as distinguished from an election of the counts to be tried first.[3]

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[3] The decisions cited by petitioner (Pet. 7-9) do not support his contention. In *Mills* v. *State*, 52 Ind. 187, 193, and *People* v. *Tinnell*, 385 Ill. 537, 541-542, the courts, far from dealing with an elimination of counts by reason of an election, rejected attempts, as here, to establish such an election upon the basis of inadvertent language or error. The remaining citations involved clear cases in which the remaining counts had been "struck" or "dismissed", or in which the defendant was himself seeking to claim multifariousness after an admitted election, or in which an election had been made after jeopardy had attached.

The contention that correction by this Court is required with respect to a statement in the opinion below that

2. Petitioner seeks to characterize his conduct in response to accusations of narcotics agents as being mere silence while under arrest and thus not an admissible subject of testimony (Pet. 2, 10-12). But the evidence in question disclosed, not mere silence but affirmative conduct in the nature of comments, denials, and laughing and smirking at the narcotics agents (*supra*, p. 6). Petitioner was not entitled to have his occasional denials and spoken comments isolated, for purposes of admissibility, from his laughter, facial expressions and occasional silences.[4]

3. The judgment is supported by ample evidence. Three police officers testified to a situation in which petitioner was standing in a dark doorway of his store at one-thirty in the morning with the motor of his car running. The store had been out of business for a month, and inside was a box of narcotics and paraphernalia from which petitioner attempted to hold back the officers. Petitioner asked the court to believe, without supporting evidence, that although he was so much the possessor of the store that his own presence was necessary to lock up the store at that hour, and although he tried to keep the police away from the place where the box was stored, the box and narcotics were not

"[c]riminal cases in the federal courts are governed and controlled by federal statutes and federal decisions, and state statutes and state decisions are inapplicable" (R. 159), is frivolous.

[4] Petitioner cites an instance in which the trial judge remarked on petitioner's silences (Pet. 11) but that remark was made during and only in connection with the argument as to the sentencing, after the judge had already made his finding of guilt in reliance upon the testimony of the three police officers (R. 129, 133, 135).

in his possession and were beyond the realm of his knowledge. Both the trial court and the Court of Appeals were convinced of petitioner's guilt (R. 161) and we submit that the evidence warrants no further review of their conclusions.[5]

CONCLUSION

The decision below is correct, there is no conflict of decisions, and further review is not warranted. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

APRIL 1953.

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[5] Petitioner also contends (Pet. 15), that this Court should direct re-sentencing because, upon pre-sentence inquiry, the trial judge heard statements of a police officer and of narcotics agents connecting petitioner with much activity in the narcotics traffic for which convictions had not been obtained. Since these statements might relate to issues of fact involved in further trial of the remaining counts, the trial judge expressed his unwillingness to try the remaining counts (R. 136). This is no indication that the trial judge was unfitted or deemed himself unfitted for the evaluation of a proper sentence. The court was entitled to consider general reputation in fixing sentence. Cf. *Williams* v. *New York*, 337 U.S. 241. He imposed a sentence three years short of the maximum that he might have imposed, and there is no occasion to "overrule sixty years of undeviating federal precedents * * * 'that the appellate court has no control over a sentence which is within the limits allowed by a statute' * * *." *United States* v. *Rosenberg*, 195 F. 2d 583, 604 (C.A. 2), certiorari denied, 344 U.S. 838, rehearing denied, 344 U.S. 889.

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